No. 211.

Brf. of Shipman for Appts

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Supreme Court of the United States

OCTOBER TERM, 1901.

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PHINEAS PAM-TO-PEE AND OTHERS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

JOHN B. SHIPMAN, Attorney for Appellants.

Coldwater Sun Print, Coldwater, Mich.

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(NOTE: The record, although bound together, contains two parts paged not continuously but each separately. The first will be referred to as the Record and the second part as the Appendix, in this brief.)

STATEMENT.

The action is upon a judgment rendered by the Court of Claims against the defendant and in favor of the appellants and other Indians, and for the money appropriated by Congress to pay it and the annuities thereby established, but no part of which has ever been paid them.

The judgment is for unpaid annuities due and the perpetual annuities to grow due the claimants therein,

under treaties between the Pottawatomie Indians and the United States and in which they were entitled to share. It is found in 27 Ct. Cl. reports 403 and the facts stated in the findings of fact and in the opinion of the Court as there reported, are a part of the facts found in this case—Rec. 10. The amount of the judgment is $104,626 and to pay it and their proportion and share of the perpetual annuities established by the judgment—the latter being finally capitalized and paid in full—Congress appropriated these sums: $104,626, 28 St. 470—$6,243.90, 28 St. 295—$2,081.30, 28 St. 885—$43,707.30. 29 St. 330—the total appropriations amounting to $156,658.50. The Commissioner of Indian Affairs was charged with the duty of distributing the money among the Indians recovering the judgment and by 28 St. 894 the Secretary of the Interior was directed to take a census of the Indians entitled to the funds and to make payments of the same, an additional $1,000 being appropriated for that purpose. The Court did not determine who the individual Indians were that were entitled to the annuities mentioned, holding that was not contemplated by the act giving it jurisdiction, but designated those in whose favor the judgment was rendered as those Indians remaining in Michigan under the treaty of September 26 and 27, 1833, to whom yearly payments were made in southern Michigan of a portion of said annuities from 1843 to 1866 both inclusive, (and their descendants). This compelled a resort to the payrolls of those years for their names. The appellants in this cause number 272 all of whom are direct de-

scendants of Indians on those pay-rolls and are Indians in whose favor said judgment was rendered and entitled to share in all the appropriations mentioned equally with all others entitled thereto Their names are on pages 4 and 5 of the Appendix (Finding IV, Rec. 9). The total number of the Indians entitled to the funds mentioned is 544—(Rec. 11). The claimants share of the fund is $78,329.25 aside from interest and as no part of it has been paid them and there is no dispute about the facts stated, it would seem the balance of the record consisting merely of alleged excuses by the defendant for not paying them, was legally immaterial. But as the decision below was made to turn upon them these will be reviewed.

The Indian Office detailed Cadman to take the census mentioned. He was furnished only with the roll of 1866 and directed to account for all the 230 Indians upon it and their descendants if dead and admonished that "*no additions are to be made to the original roll other than the descendants of the Indians whose names appear upon the roll above referred to.*" Appendix 10 and 11—Note: In the original case the Court found the number entitled was 291 in 1833.

The Attorney for the Claimants as directed by the Commissioner saw Cadman and then found out the order mentioned under which he was working, and thereupon July 27, 1895 and before his census was completed protested to the Department against the injustice of a census based only on the roll of 1866 insisting it should omit none on the prior rolls including the rolls of 1843 and 1844 and to that end that those

rolls be sent Cadman at once with directions to include all on those rolls and their heirs if dead in his census, *inclosing in the letter a list containing the names of over 150 of the claimants herein, the names of their ancestors and number on the pay-rolls of 1843 and 1844 being given in the letter* also advising them there were others and requesting that he be advised of the course determined on so that if necessary a remedy might be sought before the fund was paid out—Rec. 90 Appendix 11. But no change was made in Cadman's orders and he completed his census under the erroneous order mentioned basing it wholly on the roll of 1866, and it was filed in the Department August 1895—Rec. 8 and 9.

Nothing further appears to have been done in the matter until Jany. 10, 1896, when the Secretary directed the Commissioner to include all Indians on the rolls from 1843 to 1866 in the census, or who were descended from anyone on those rolls, in effect as insisted by the Claimants Attorney in his letter of July 27, 1895.

February 5, 1896 Shelby was detailed by the Indian Office with written instructions quite different from Cadman's. He was directed to examine and report upon the claims of certain parties claiming a right to share in the judgment mentioned; advised of the Secretary's decision as to who should be enrolled, and then came the following directions:

"You will therefore require all persons *applying to you* for consideration of their claims, to submit proof *fully substantiated by two or more reputable witnesses* that they are the direct descendants of some person upon some one of the above mentioned rolls * * * and

if possible *to tell what rolls their ancestors were upon.* If claim is made as a grandchild of some person whose name was upon one or more of the rolls above referred to *it will be necessary to show why his own parents were not enrolled* and whether they did not remove west in compliance with the stipulations of the treaty of September 27, 1833 and there receive lands and annuities * * * As this office and the department have decided that all names now on the Cadman roll are entitled to participate in said payment you will therefore make no additions to or deductions from said roll * * * *You are not required to make any roll whatever* but will make report in detail giving the evidence in each case separately for the consideration of the office"—Appendix 14 and 15.

But Shelby also had ideas of his own as to how to obey and yet defeat the Secretary's order of Jany. 10, 1896 in emergencies not fully covered by his instructions, which can be gathered from his report to the Commissioner of what he did and what he did not do with those applying for enrollment none others being considered. It is dated March 14, 1896 and states:

"Under instructions from your office dated February 5, 1896 directing me *to make an investigation of Sundry Claimants* to enrollment upon Pottowatomie roll of Indians falling under the supplementary treaty of September 27, 1833, I have the honor to submit in detail my report *upon each claimant submitted. In addition to the list of those furnished me by your office,* I heard the application for enrollment of quite a number of other Indians who in my judgment have no standing in this matter *as they could not show* that either themselves or their ancestors were enrolled upon any of the rolls from 1843 to 1866. I took no evidence in such cases but informed the parties that they have no right to enrollment"—Appendix 15 and 16.

Then follows the names of those he investigated

and an examination of them shows that the list of over 150 of the claimants in this cause which was sent to the Indian office July 27, 1895, with the name of their ancestors and number on the pay-roll of 1843 and 1844, was not furnished him. Two claimants however seem to have made an attempt to get on the roll but he ruled against one straightway and the other abandoned the idea when informed of what Shelby required him to prove as a pre-requisite to his case being considered at all. But both of these are in the list of those whom the Court below found were entitled to share in said fund. In summing up Shelby says:

"In my judgment none of these Indians have any right to enrollment * * * for the reason that all with possibly two exceptions, have failed to make positive proof. *They themselves or their witnesses could not state positively that their supposed ancestor was ever enrolled with said Indians, or that they drew money on the roll upon which they were found, or that there was not another Pottowatomie Indian by the same name.*"

He however found two on the roll of 1866 who had escaped Cadman which he advised be added to Cadman's roll and it was done and later the Department discovered and added another.—Appendix 22. Rec. 9.

It was to the Indians upon this roll so made by Cadman with the three names added by the Department that $118,554.52 of the funds appropriated by Congress as mentioned, was paid out not a cent of it being paid these claimants. But what became of the balance of the $156,658.50 appropriated the record does not show.

It does not appear that any attention was paid to the request in the letter of the Claimants' Attorney of July 27, 1895, to be advised of the course determined on by the Department to the end that if the conclusion was to proceed under a census based upon the roll of 1866 (who made it being immaterial) the Claimants might have time to seek a remedy before the fund was paid out—or that he ever saw Shelby or knew of the difference between his orders and Cadman's in taking the census or had any reason to know of it—or that he had any information as to what the Indian Office was doing or proposed to do—except as he obtatned it by finding Cadman in the field as stated. Had the Department given him any such information the defendant's call upon it for "papers and information relative" to the claim would have developed it. And there is no pretence but that the sum of $78,329.25 outside of interest is still unpaid the Claimants upon the various treaties sued on extending as far back as 1795 made by the United States with their Ancestors. The Court of Claims dismissed the petition and the claimants appealed.

ASSIGNMENT OF ERROR.

That the Court below erred in not rendering a judgment in favor of the claimants for their share of the funds mentioned.

JURISDICTION.

The jurisdiction of the court is well settled upon two grounds. First—The Court of Claims has jurisdiction of a claim based upon the unpaid balance of a judgment.

United States v. O'Grady's Exrs. 22 Wall. 641 (22:772).

Hobbs v. U. S. 19 Ct. Cl. 220, 229.
Brown's Case 6 Ct. Cl. 171.

Second—Under the specific appropriations made by Congress mentioned a means of satisfying the claim was provided. The claim is therefore also founded upon a law of Congress within the meaning of Rev. St. Sec. 1059 and is one of which the Court of Claims has jurisdiction.

United States v. Weld 127 U. S. 51 (32:62).
HuKill's Case 16 Ct. Cl. 562.
Hoffman's Case 17 Ct. Cl. 55.
Mordicai Case 19 Ct. Cl. 11.
Wray Case 19 Ct. Cl. 154.
Jordon's Case 19 Ct. Cl 108.
George's Case 18 Ct. Cl. 432.
Blount's Case 21 Ct. Cl. 274.

ARGUMENT.

Having jurisdiction of the subject matter and the claim itself being conceded what defence to the suit short of payment, which is not pretended, is possible?

The decision of the Court below upon the legal rights and duties springing from the relation of debtor and creditor occupied by the parties in this case, is without judicial support.

No principle of law exists which will protect a debtor, who pays his creditor's money to the wrong man, against the claim of the party to whom the fund belonged, for a debtor is bound to know his creditor and to find and pay him before his obligation will be cancelled. Nor is the creditor by any known rule of law, required to follow up the debtor to prevent his paying the wrong man, in order to be safe. Nothing but payment to the creditor destroys a debt, or ends

the debtor's duty and liability to a suit for it. In Jones v. Ricketts 7 Md. 108,117 the Court say it is the *duty of a debtor* to seek his creditor for the purpose of paying him and refused to allow a journey, although a long one, to figure as a consideration in an alleged settlement of the claim sued on. And in Startup v. Macdonald 6 Man. and G. 593 the Court holds the creditor must find the debtor at his peril "if he be within the four seas." If no place of payment is fixed in the contract then payment must be made where the creditor is, but in this instance the annuities by the express provision of the treaty, were payable in Michigan. Ignorance of where the creditor can be found, does not excuse the debtor from the performance of this duty. He must seek and find him "if within the dominion." And an actual tender of the amount due by the debtor and refusal by the creditor to accept it only affects the question of interest and costs afterwards but does not defeat a suit for the debt. Nothing will do that but actual payment of the money by the debtor to and an acceptance of it by the creditor. All this is text book law. It is the law "for the intelligent" everywhere. See 1 Beach on Contracts Sec. 329 and cases there cited. But the Court below seem to have acted upon a theory the reverse of this. In other words that it is the duty of the creditor, to seek and compel the debtor to pay, a rule which would reverse every decision allowing interest against a debtor for non-payment of his debt.

No plea of ignorance or of being misled as to the claimants' right in the fund to base an estoppel on, can

avail, for, aside from the fact that the Department had actual notice of it, the defendant was an active participant in the litigation in the Court of Claims and in the Supreme Court where their right was contested and decided and knew all about it.

The exact point upon which the decision below turned lies in the following excerpt copied from its opinion:

"In this case the claimants knew, or could have known, that the census made by an agent of the Interior Department (Cadman) was returned and filed in August 1895 and that the final decision of the Secretary of the Interior was made in January 1896. So far the case seems clear. The resulting question is, were the claimants bound to ascertain between that time and the payment of the fund during the month of November 1896 that their names were on the pay-roll, or might they assume that the direction of the Secretary would be correctly carried out by his subordinates? The Court has reluctantly come to the conclusion that the burden rested upon the claimants. The documentary proceedings in the Interior Department were not completed when the order of the secretary was made. His decision was his direction that a new pay-roll be made, and the circumstances required vigilance on the part of persons whose right to be there had not yet been determined by name to see that their names were duly placed upon the final pay-roll."

This conclusion as to what the claimants must have done to retain what belonged to them under the treaties mentioned, required them to assume and to act upon the presumption, that the Secretary and his subordinates would not do their duty and put their names on the pay-roll, and while their acts since have demonstrated the wisdom of such a presumption in this in-

stance Courts have not yet gone so far as to require parties to act upon such a presumption or punish them with forfeiture of rights if they do not. It is to be presumed that Government officers will always do their duty whether they do it or not say the Courts.

United States v. Crussell 81 U. S. 821.

United States v. Pugh 9 Otto 265.

In this case they were paid $1,000 for doing it also.

The opinion fails to point out how the claimants could get their names placed upon the roll if they discovered they were not there, while an earlier part of the opinion seems to admit they were powerless to compel this to be done.

It must also be remembered that the Indian office had the names of over 150 of the claimants with the names of their ancestors and number on the pay-rolls of 1843 and 1844 which were sent it July 27, 1895, and before any roll had been completed, whereof enrollment was refused, no attention whatever being given them and the accompanying request that those rolls be sent Cadman at once "and he be directed to include in his census all the Indians or if dead the heirs of all Indians whose names appear thereon" (Appendix 13) was also ignored by the Department as well as the request for information in regard to the course decided on. Instead, Cadman's roll was finished under the roll of 1866 and returned to the office and filed in August 1895 not one of these claimants names being upon it, while the instructions to Shelby charged him that this roll was unchangeable. In effect the 150 claimants (and over) upon said list were denied any hearing whatever.

Notwithstanding this, two of the claimants on their

own motion attempted to have Shelby put their names on the roll but he declined. Appendix 17 and 19. Now what is to be done with this 150 (and perhaps two more) who complied with the letter and spirit of the "burden" cast upon the claimants by the Court below? They are under the same ban placed upon the other claimants who were unprepared to meet with proof this extraordinary issue of fact raised by the Court which no lawyer could anticipate before the opinion was promulgated. Even under the opinion rendered this 150 or 152 were entitled to recover their share of the fund.

The Court was also wrong in assuming that the claimants knew or might have ascertained as a matter of fact whether their names were on the roll filed by Cadman in August 1895 as well as the decision of the secretary made in 1896 before the payment of the fund in November 1896. The Department do not give out such information. The claimants, not one of them, were recognized as having any right in the fund and their Attorney shared their fate and their ignorance. By getting a direction to see Cadman he succeeded in ascertaining what the Commissioner could have informed him of if so inclined and he then promptly protested to the Secretary against the contemplated wrong. But the protest was vain so far as it concerned Cadman's work. His census based wholly on the roll of 1866 was returned filed and verified and by the Department declared to be changeless forever. The request to be informed of the conclusion upon the question submitted was ignored and the list of claimants

sent, and which are found by the Court to be entitled to share in the fund, was turned down and even denied a hearing. The decision of January 10, 1896, by the Secretary and also the order falsely claiming to be made under it, to Shelby, were also official secrets not to be disclosed except under a direction from the Department. These are the rules and practice of the Department and the Court below had no right to assume otherwise or act upon any other theory.

But the proposition upon which the Court below turned the case is bad as a whole, as, in principle has been more than once decided by this Court. To entitle the Claimants to recover it was not necessary for them to follow up Shelby and importune him to place their names upon the final pay-roll even were it not apparent that their efforts (judging by the fruitless attempts made) would have availed nothing, nor to have applied to the Indian Office for a like purpose as over 150 of them did without success. A rule of the Court of Claims once existed requiring claims to be presented to the proper department for payment before suit brought upon them, and in Clyde's Case (5 Ct. Cl. 134, 140) that court in passing upon one of the claims involved uses this language: "It appears by the return of the Quartermaster General that no account of the claim is to be found in his department and it does not appear by any testimony of the claimant that the claim has been submitted to any department." Thereupon it found against the claim.

The case coming here on appeal however this Court decided the rule was void holding in substance

that the fact that the claim had never been presented to any department for payment and had never been allowed or rejected by any officer of the Government was immaterial and in no way affected the claimants right to sue and recover upon it.

United States v. Clyde 80 U. S. 38 (20:479).

United States v. Kaufman 96 U. S. 571 (24:792) also practically decides that a claimant may sue at once in the Court of Claims and without first presenting the claim to any department for payment. See also *Campbell v. United States* 17 Otto 407 (27:592).

In *United States v. Knox* 128 U. S. 230 (32:465) the point was distinctly made Miller Justice stating it as follows: "The second objection made by counsel for the United States is that the claim should have been presented at the Treasury Department and have been disallowed by the accounting officer;" but the Court decided against this contention holding this was unnecessary citing with approval United States v. Clyde in support of its ruling. It was also urged that the claimant should have resorted to a mandamus to compel payment before bringing suit upon the claim, but the Court decided against this contention also. This decision is cited with approval on the first proposition (the second not being involved) in *United States v. Ewing* 140 U. S. 144 (35:389) and in *United States v. Fletcher* 147 U. S. 667 (37:322).

These cases seem to be decisive of and against the proposition upon which the Court below turned this case and disallowed the claim. Besides, there is no rule of law or of morals that can excuse much less

justify the payment of the Claimant's share of the fund in question to any persons but them, after the defendant had notice of their right to it as the opinion concedes was the fact, whatever the claimants did or did not do towards having their names placed on the pay-roll.

The opinion also says "the Counsel for the defendants has taken the broad ground that the Government cannot be made to pay a second time" and produced authorities to sustain the position which however the opinion admits did not meet the present case. Clearly they could not for here the question is whether the defendants can escape paying once.

The authorities referred to, stated generally, are cases where a fund, usually but not always a trust fund, existed in which different parties claimed interests but disagreed as to their respective rights in it, or where all interested in it were not known, and to settle all questions about it the Chancery Court is appealed to. All asserting or who can assert an interest, are brought in by personal or constructive process and given a trial and hearing, terminating with a decree declaring the rights and equities of all interested. Upon payment of the fund as directed by the decree the custodian was protected usually from further litigation about it.

In the case at bar our contention is that the defendant should have followed these precedents and filed a bill of interpleader, or other proper Chancery bill, to determine who the funds mentioned belonged to, under the circumstances existing, to entitle it to

protection in paying them out; the claimants, as well as those to whom the $118,554.52 was paid, being citizens of the United States residing in Michigan and could have been reached through the Courts in that State but through which the Claimants could not reach or control the defendant. No one has yet told who got the balance of the fund not paid out amounting to $38,103.98 however.

The right of the Claimants to recover upon the conceded facts in this case, is so well settled by the Courts, it would seem serious contention upon the question was impossible. The cases are so uniform and numerous that the text books only will be referred to, the cases being cited in the toot notes.—2 Perry on Trusts Sec. 926 states the law thus:

"*Trustees, and all other persons having money in their hands to distribute and pay over to other persons, must see that the money reaches the hands of the persons entitled to receive it: for if they make any mistake in the person to whom they pay the money they are still liable to pay it to the proper person.*" Sections 927 and 928 state how they can protect themselves in cases of doubt as to whom it belongs, sustaining the claimants contention in this regard.

2 Beach on Trusts Sec. 523 and 524 are to the same effect even going so far as to hold if the custodian is induced to make the payment by fraud or deception it will be no defence to a suit for it by the one entitled. Good faith is no defence to the action In case of doubt who to pay, he should apply to the Court to settle the matter and if he does not "he is

without apology in making payment to the wrong person."

1 Lewin on Trusts 344 (Sec. 6) is the same adding however "where there is a mere shadow of doubt as to the rights of the parties" he should apply to the Court.

Underhill on Trusts pages 486 to 488 states the same rule.

OTHER CONSIDERATIONS.

While all legal objections to the claimants' recovery raised by the Court below or that can be anticipated here seem to be sufficiently answered and disposed of, there still remains matters to which attention should be called. In the original suit (27 Ct. Cl. 403) a stenuous effort was made to shut these claimants out of the case to the end that the others might have all the unpaid annuities sued for, as appears by the opinion rendered therein. The attempt was a failure. In the Indian Office it was a success How was this unjust result brought about?

Cadman in taking the census was ordered to account for all Indians on the roll of 1866 and their heirs if dead, but to add none others. He was hampered by no special rules of evidence in doing this, but he was confined to the roll of 1866—(Appendix 11). Discovering this the claimants' attorney protested against the injustice in a letter to the Secretary of the Interior July 27, 1895, asking that the rolls of 1843 and 1844 be included in his work—Appendix 11-14. No attention was paid to this, Cadman being allowed

to proceed under the roll of 1866, and then in August his erroneous roll containing none of the claimants' names was filed and approved by the Department.

But January 10, 1896, came an order by the Secretary that all of the rolls from 1843 to 1866 be included in the census. Then Shelby is sent into the field in place of Cadman, but with instructions widely different and under which no one could have done right by any Indian claiming through rolls prior to 1866. If the purpose was to have a census taken of those on the prior rolls, his orders would have been like Cadman's simply to "account for all the Indians who names appear upon the rolls" from 1843 and 1866 and if dead their heirs. But this was not done. Instead, Shelby was ordered "to examine and report upon the claims of the several parties" whose names were then furnished him, the claimants not being among the number.

His instructions also cast upon the Indian the burden of proving what roll his ancestor's name was on when the Indian had never seen any of the rolls, and also to establish it by an amount of evidence not required in taking the Cadman census nor ever required to establish a civil right in this country. It must also be kept in mind that none of the rolls were accessible to the Indians under the rules of the Department, and yet an Indian asserting a claim to be considered at all by Shelby, was required to "fully substantiate" by two or more witnesses that his ancestor's name was upon them, which was requiring an impossibility of

him as a pre-requisite to a consideration of his claim at all.

Shelby was not directed to find the Indians or the descendants of any Indians on the rolls from 1843 to 1866. Why not, if it was ever intended to include them in the census as required by the secretary's order?

His report shows he followed the instructions to the letter, only varying them to add worse features. He names two of the claimants in it only and of course ruled them out although the Court below finds they were entitled to share in the fund and therefore ought to have been enrolled. One of his new rules added to the instructions as appears by his report is that the applicant in addition to the other impossible requirements, must establish "that there was not another Pottawatomie Indian of the same name." This last idea is Shelby's own. It would effectually prevent any Indian from getting upon the roll through a gap left in his instructions. To call such a report a "census" is a misnomer. The findings of fact in this cause show he omitted 272 Indians who were entitled to be placed on the final pay-roll. Over 150 (and perhaps two more) of them tried and failed to get there. It is manifest that had the others made a similar attempt the result would have been the same. There is not an attribute about it that entitles Shelby's mission and work to the favorable consideration of any Court.

The proceeding was adopted ostensibly to carry out the Secretary's order of January 10, 1896, but its effect necessarily was to defeat it and shut out these

claimants from participating in the fund to be distributed and preserve it all for those on the roll of 1866 the same as was attempted on the trial of the original case. It looks very much as if its success was not owing to the mere blunders of officers, however, but was brought about by an intelligence behind and directing their actions. But whether the wrong was intentional or not, the claimants should not be made to suffer by it.

It is idle to talk of proving the right of any person to have his name placed on the roll before Shelby or the Indian office. Neither were vested with judicial powers. The Act of Congress "directed" the Department to "take a census" of the Indians entitled to the fund in question and pay them, appropriating $1000 for the purpose (28 St. 894). That means an enumeration of the Indians on the rolls from 1843 to 1866 and their descendants entitled to the money, as decided by the Court. The rolls are a verity, being made so by the findings and judgment of the Court. No Indian agent had or could be invested with authority to drop or leave off one Indian upon any of the rolls whatever the cause might be, as Shelby assumed to do. United States v. O'Grady's Exr's 22 Wall, 641. The duty devolved upon the Indian office and upon Shelby was purely ministerial and in no sense judicial or that of an arbitrator. The claimants' right had already been judicially determined and final judgment rendered thereon by the Court, leaving nothing to be done but to pay them the moneys appropriated for that purpose.

SOME IDEAS THE SITUATION SUGGESTS.

Under the Act of Congress [28 St. 894] it was the duty of the defendant to take a census of the Indians entitled to the funds before paying out any of it to them and it cannot shirk this duty or throw any part of its performance over upon the claimants.

The defendant cannot require the claimants to watch it or its agents to see whether or not this duty was performed to entitle them to recover their share of the money.

The defendant had no right to require the claimants to perform any part of the work in taking the census it was its duty to make and the $1000 was appropriated to pay for.

The fact that the census included only half of the Indians entitled to the fund in question is conclusive evidence it was worthless and that it should not have been made the basis of any action by the Department.

The fact that the census contained the names of only 272 Indians when there was 291 of them in 1833 [Rec. 10 and 11] was sufficient to put the defendant upon inquiry as to how this could be and to require it to stop and not use it as a basis of payment until the truth was ascertained.

The defendant cannot be excused from paying the claimants because they did not compel the defendant or its agents to place their names upon the census or pay-roll.

The fact that the claimants did not compel or

cause the defendant to place their names on the pay-roll does not relieve the defendant of its duty to do so.

The fact that the claimants did not "see that their names were duly placed upon the final pay-roll" [the Act of Congress requiring the defendant to do this] does not bar their right to be paid the money promised by the treaties and fixed by the adjudication of the Courts thereon.

The defendant cannot charge the claimants with the consequences of its own non-performance of duty.

The burden of getting the claimants' names upon the final pay-roll did not rest upon them but upon the defendant.

Neither by the treaties, the judgment rendered thereon, nor by any law of Congress, regulation of the Department, or law of the land, were the claimants required "to see that their names were duly placed upon the final pay-roll" to entitle them to their share of the funds in question.

The claimants were not bound to show what efforts were made by or in their behalf to get "their names duly placed upon the final pay-roll" or their failure to receive recognition at the Department, to entitle them to recover their rights in a court of justice. No such burden rests upon them.

The defendant having notice that more than 150 Indians entitled to share in the funds existed, whose names were not "duly placed upon the final pay-roll," all moneys disbursed thereon were paid in the defend-

ant's own wrong, and the act cannot be made to ennure to its benefit in this suit or be used to defeat the claimants' recovery.

The right of the claimants to the money promised by the treaties and adjudged by the Courts cannot be made to depend upon their names being on a census or pay-roll made by a Department employe.

The treaty of September 26 and 27, 1833, made it the duty of the United States to pay this money to the Indians in Michigan [7 St. 442-5]. The law of the land governing the relation of debtor and creditor required it. The Act of Congress mentioned [28 St. 894] commanded it.

And the claimants insist that the defendant be not discharged of this liability short of performance of that duty.

The facts being all conceded, the claimants respectfully ask this Court to render such a judgment in the case as the Court below ought to have rendered. The total amount of the fund is $156,658.50. The total number of the Indians entitled to it is 544 [Rec. 11]. The total number of the claimants is 272, their names being in Schedule A on pages 4 and 5 of the Appendix [Finding IV Rec. 9 and 10]. The total sum belonging to the claimants of the fund mentioned is $78,329.25 whereof each claimant is entitled to $287.97 aside from interest. But it is insisted that interest be allowed if not from the date of the judgment, at least from the time the other Indians were paid in November, 1896, as damages for the unjust

detention of the money. If allowed this will increase each claimant's share proportionately. They ask a several judgment.

JNO. B. SHIPMAN,

Att'y for Appellants.